

FEDERAL COURT OF AUSTRALIA

Australian Workers' Union v Registered Organisations Commissioner (No 9)

[2019] FCA 1671

SUMMARY

In accordance with the practice of the Federal Court in some cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of the application in these proceedings and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at www.fedcourt.gov.au together with this summary.

The *Fair Work (Registered Organisations) Act* 2009 (“**RO Act**”) provides for associations of employees and for associations of employers to be registered and confers regulatory functions upon the Registered Organisations Commissioner (“**Commissioner**”). Section 331(2) of the RO Act provides that “if the Commissioner is satisfied that there are reasonable grounds for doing so”, the Commissioner may conduct an investigation as to whether a civil penalty provision of the RO Act has been contravened.

Section 237 of the RO Act deals with a financial reporting obligation, namely an obligation imposed on registered organisations to file within a specified time a statement of particulars of any loans, grants or donations made in a particular financial year. Sections 285, 286 and 287 deal with financial probity obligations and impose care, diligence and good faith obligations upon the officers of organisations and protect against the misuse by an officer of his or her office.

On 20 October 2017 the Commissioner (via his delegate Mr Enright) decided to conduct an investigation (“**Investigation**”) pursuant to s 331(2) of the RO Act as to whether, in relation to conduct in the financial years ending 30 June 2006 and 30 June 2008, the Australian Workers Union (“**AWU**”) and its officers had contravened the provisions of the RO Act to which I have just referred. Based on a suspicion that the rules governing the Australian Workers' Union (“**AWU's Rules**”) may have been contravened, the Commissioner suspected

that ss 237, 285, 286 and 287 may have been contravened in relation to donations made by the AWU to an organisation known as GetUp and various donations to persons or entities associated with the Australian Labor Party, including for the 2007 election campaign of the Honourable Bill Shorten MP (“**Mr Shorten**”).

In the course of the Investigation and on 24 October 2017 search warrants were executed by the Australian Federal Police on the Melbourne and Sydney offices of the AWU and various documents were seized.

In this proceeding, the AWU contended that the Commissioner’s Investigation is invalid because the decision made to conduct the Investigation is affected by jurisdictional error. The AWU also contended that the search warrants are invalid. The AWU sought declarations that both the decision to conduct the Investigation and the search warrants are invalid and an order requiring that the documents seized on the execution of the search warrants be returned to the AWU.

There were five grounds relied upon by the AWU in respect of its case that the decision to conduct the Investigation was invalid.

First, the AWU contended that the Commissioner had no power to investigate whether the RO Act had been contravened by conduct which pre-dated the conferral upon the Commissioner, on 1 May 2017, of his power to conduct an investigation. I have rejected that ground, holding that there is no temporal limitation on the Commissioner’s power to conduct an investigation pursuant to s 331(2) of the RO Act.

Second, the AWU relied upon the statutory precondition to the exercise of power under s 331(2), that the Commissioner must be “satisfied that there are reasonable grounds” for conducting an investigation. It was not in contest that in deciding to conduct the Investigation, the Commissioner was validly satisfied that there were reasonable grounds for conducting an investigation as to whether the financial reporting obligations in s 237(1) of the RO Act had been contravened. However, the AWU contended that the Commissioner had not been validly satisfied that there were reasonable grounds for conducting the Investigation in relation to whether the financial probity obligations in ss 285(1), 286(1) and 287(1) of the RO Act had been contravened. On that contention, the AWU has succeeded.

Broadly speaking, I have held that the Commissioner’s satisfaction that there were “reasonable grounds” was based on acts suspected by the Commissioner to have been done

in contravention of the AWU's Rules and that that suspicion could not sustain the opinion that there were reasonable grounds to conduct an investigation in circumstances where, by the operation of s 320 of the RO Act, the suspected acts in question, if done, must be "taken to have been done in compliance with the rules of the [AWU]". Section 320 of the RO Act is a deeming provision which has the effect that, on the expiration of 4 years from the doing of an act in contravention of the rules of a registered organisation, that act is deemed to have been done in compliance with the rules of the organisation. The Commissioner considered that s 320 was inapplicable. He was wrong to have done so with the result that his basis for being satisfied that there were "reasonable grounds" for the conduct of an investigation as to whether ss 285, 286 and 287 of the RO Act had been contravened was flawed. In that respect the Commissioner did not proceed reasonably in forming the opinion or state of satisfaction he was required by s 331(2) of the RO Act to form and the decision to conduct an investigation as to whether ss 285, 286 and 287 were contravened is affected by jurisdictional error and invalid.

The AWU's *third*, *fourth* and *fifth* grounds may be dealt with together. The *third* ground impugned the decision to investigate on the basis that it was made for an improper purpose of aiding in, assisting or promoting an alleged improper political purpose of the Minister for Employment, Senator the Honourable Michaelia Cash ("**Minister**") to embarrass or politically harm her political opponent Mr Shorten who, at the time of the conduct which is the subject of the Investigation, held the position of National Secretary of the AWU. In support of this ground, the AWU relied upon a wide range of factual matters, evidence of which occupied most of the trial. I have concluded that the evidence before the Court does not establish that the decision made to conduct the Investigation was made for the improper purpose contended for by the AWU. On this ground, the AWU fails.

The AWU's *fourth* ground is related to the third. The *fourth* ground impugned the decision to investigate because the AWU contended that an irrelevant consideration was taken into account, namely the Minister's political purpose. This ground was sought to be supported by the same evidence that the AWU relied upon in support of its *third* ground. I am not satisfied that, on the evidence, the Minister's alleged political purpose was taken into account as an irrelevant consideration in the decision made to conduct the Investigation. The AWU also fails on this ground.

The AWU's *fifth* ground is based on the assertion that in making the decision to investigate

the Commissioner impermissibly acted upon the advice or direction of the Minister. The contention was that concerns expressed and requests made by the Minister in two letters forwarded to the Commissioner by her had influenced the decision to investigate. On the evidence, I have held that the AWU has not demonstrated that the Minister's communications to the Commissioner were a material and operative reason for the Commissioner's decision to investigate. Accordingly, I have held that the decision to investigate was not invalid on the basis of this ground.

Having concluded that the decision to conduct the Investigation is invalid in so far as the Investigation concerns whether ss 285, 286 and 287 of the RO Act has been contravened, I have given some consideration as to whether the search warrants are invalid. I have concluded that that matter, as well as the nature and extent of any declarations or orders that should now be made, should be the subject of further submissions from the parties and a short further hearing. The orders I will make will facilitate that course.

BROMBERG J

11 OCTOBER 2019

MELBOURNE